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1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8

9
10 Ex parte CARL ERIK HANSEN,
11 CHRISTOPHER BUDWIG,
12 SUNIL KOCHHAR,
13 MARCEL ALEXANDRE JULLERAT,
14 JEAN-CLAUDE SPADONE,
15 PIERRE NICOLAS,
16 ROBERT REDGWELL,
17 EUAN ARMSTRONG,
18 and DIETMAR SIEVERT
19

20
21 Appeal 2009-2307
22 Application 10/824,376
23 Technology Center 1700
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26 Oral Hearing Held: April 7, 2009
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30 Before BRADLEY R. GARRIS, JEFFREY T. SMITH, and
31 MICHAEL P. COLAIANNI, Administrative Patent Judges
32

33
34 ON BEHALF OF THE APPELLANT:

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1 MS. LYNCH: Okay. Good morning. My name is Rachel Lynch and
2 I'm here on behalf of Appellants for U.S. Serial Number 10/824,376. The
3 only issue on appeal is one of obviousness in view of six references. As I
4 will discuss and as I hope you will agree, the obviousness rejection is
5 improper as a matter of fact and law.

6 Now before we get into the rejections, I'd like to briefly describe the
7 patent, the patented application. The invention generally relates to processes
8 with the manipulations of the flavor of a mass of chocolate using
9 conventional processes for manufacturing the chocolate and adding a flavor-
10 effective amount of a noncocoa dairy flavor to the chocolate mass. The
11 invention is also directed to chocolate products containing a flavor-effective
12 amount of the said noncocoa dairy flavor.

13 Generally speaking, with chocolate manufacturing it's important to
14 match a chocolate flavor attribute with the flavor intensity type of the other
15 ingredients combined with the chocolate. For example, a chocolate flavor
16 attribute is desirable for a chocolate biscuit, where a strong flavor or strong
17 cocoa flavor attribute is required to offset a mint flavor intensity. Thus, it
18 would be beneficial to manipulate the flavor associated with chocolate
19 produced by a single process to obtain a flavor attribute of choice by adding
20 the desired flavor attributes to a single chocolate mass. Applicants have
21 surprisingly found that the flavor attributes are not always associated with
22 cocoa and/or milk dairy flavors and that they may be obtained by adding
23 noncocoa and/or milk dairy flavors.

24 The claims are fairly straight forward. There are 9 independent claims
25 and 11 dependent claims. I won't recite what each claim recites, but they do

generally include noncocoa dairy flavoring and conventional processes for manufacturing the chocolate.

The Patent Office rejects Claims 1 through 5 and 11 through 20 under 103 as being unpatentable over Ripper in view of Rusoff. Claims 1 through 4, 6, and 10 through 20 are rejected under 103 as being unpatentable over Ripper in view of Kleinert or Watterson. Claim 7 is rejected under 103 as being unpatentable over Ripper in view of Rusoff and further in view of Eggen. And Claims 8 through 9 are rejected under 103 as being unpatentable over Ripper in view of Rusoff and further in view of Hansen.

Beginning with the primary combination of Ripper and Rusoff, Applicants submit that the references are deficient with respect to the present claims because the references fail to teach each and every element of the present claims and because a skilled artisan would have no reason to combine the references to arrive at the present claims. The rejection is premised on Ripper allegedly disclosing the manufacture of chocolate liqueur by treating the chocolate with a reduced pressure to remove the undesired flavors of the product. The Examiner states that the present claims differ from Ripper in the recitation of the selection of certain noncocoa dairy flavor attributes. To remedy this deficiency the Examiner cites Rusoff as disclosing combinations of peptides containing glycine or alanine with saccharide material to create a chocolate flavor. In contrast, Appellants respectfully submit that a skilled artisan would have no reason to combine these references because both Ripper and Rusoff teach away from the present claims. For example, Ripper teaches manufacturing chocolate by a process wherein the conching step is entirely replaced by the use of a scraped heat exchanger. Ripper expressly teaches that, traditionally, quality

1 chocolate is manufactured by mixing the chocolate-making ingredients
2 together and refining and then conching the resulting mixture. Conching
3 times are very extended, quoted as 10 to 96 hours depending on the type of
4 the chocolate that you want to produce. Ripper further states that it would
5 be appreciated from the above that the traditional chocolate-making method
6 is both expensive in terms of process time and terms of equipment cost.

7 Therefore, it is an object of Ripper to provide an improved method
8 which is relatively simple and quick and which enables quality chocolate to
9 be produced without the time and equipment costs. Therefore, it's very clear
10 that Ripper explicitly discourages the skilled artisan from using a traditional
11 or conventional chocolate manufacturing process, which includes the step of
12 conching. This is in direct contrast --

13 JUDGE GARRIS: Well, let me ask you if you have defined in your
14 specification what you call in your claim a conventional process?

15 MS. LYNCH: The word conventional is not explicitly defined in the
16 specification, but if you look in the background of the invention, in the
17 specification at pages -- at page 1, line 17 through 26, the general process for
18 making chocolate includes refining, conching and tempering, and the words
19 traditional method or -- the spec specifically says that, another traditional
20 method of producing milk chocolate. Milk chocolate is prepared by a
21 traditional method of producing milk chocolate.

22 It's repeatedly discussed in the background of the specification that
23 traditional or conventional means of making chocolate must include the
24 three steps of refining, conching and tempering. And Applicants added the
25 claim limitation of conventional to mean these traditional methods of
26 manufacturing chocolate. In Ripper --

1 JUDGE GARRIS: Of course, our problem here is that we don't -- I'm
2 looking at the specification disclosure you're referring to here and I see that
3 it talks about a traditional method and uses -- indicates that conching is used
4 in one traditional method and conching is used in another traditional method.
5 But what we don't have is a statement that conventional methods of
6 processing must necessarily include the conching step, which would support
7 your argument that, well, Ripper's method does not include a conching step,
8 therefore it's excluded by the claim. What I would ask you then is why
9 didn't you just amend the claim to exclude a conching step?

10 MS. LYNCH: Generally, as you know, patentees tend to try to avoid
11 any negative limitation. So in this case, it was attempted to have a positive
12 limitation that we could add. And as described in the background of the
13 invention, Applicants rely on this disclosure to support the claim limitation
14 that a conventional method does include refining, conching and tempering.

15 JUDGE GARRIS: If we ultimately decide that it's not appropriate to
16 interpret Claim 1, for example, in this manner, what else would you argue
17 distinguishes the claim from the prior art?

18 MS. LYNCH: Well, specifically, in this case, if Your Honor is
19 suggesting that a negative limitation of not including conching would in fact
20 get over the Ripper reference which discourages the use of methods
21 including conching, Appellants submit that it may be possible in a
22 continuation to include such a negative limitation.

23 JUDGE GARRIS: The Board will not be taking a position on that
24 matter. That would be advisory. No, I'm merely just asking whether Claim
25 1 as presently worded distinguishes in some other way from the prior art that
26 you would like to argue now.

1 MS. LYNCH: Of Ripper?

2 JUDGE GARRIS: Yes.

3 MS. LYNCH: Yes. Claim 1 also requires a noncocoa dairy flavor at
4 line 3 of Claim 1, which Ripper also does not disclose and which the
5 Examiner admits Ripper does disclose.

6 JUDGE GARRIS: Now is this conventional in the prior art to use
7 noncocoa dairy flavor attributes? I thought I had seen that in your
8 specification.

9 MS. LYNCH: Yes. There are -- it is known in the art to use flavor
10 attributes. However, what's typical are things such as adding vanilla flavor
11 to enhance the chocolate flavor, which is specifically discussed in the
12 specification. But if you also look in the specification, flavor attributes are
13 specifically defined and they're defined as a noncocoa and/or milk dairy
14 consumer recognizable flavor attribute associated with chocolate and not a
15 nonchocolate flavor for the mere enhancement of the chocolate flavor, for
16 example, by adding vanilla.

17 So we do -- Appellants do specifically define what the term flavor
18 attributes mean in the specification and, as such, Ripper does not disclose a
19 flavor attribute. So the Examiner uses Rusoff to disclose these flavor
20 attributes. But, as I'm sure you're familiar with Appellants' appeal brief,
21 Appellants submit that Rusoff is entirely directed to the production of
22 artificial chocolate flavor that acts as a substitute for natural chocolate
23 flavor, or a fortifier or extender of a natural chocolate flavor. This is in
24 direct contrast to Appellants' specific definition of what can be a flavor
25 attribute.

1 As discussed prior, our flavor attributes are a noncocoa dairy flavor
2 other for chocolate flavor enhancement. Moreover, the purpose of the flavor
3 --

4 JUDGE SMITH: Excuse me. But wouldn't artificial flavor be
5 noncocoa?

6 MS. LYNCH: If you read Rusoff, the artificial flavoring that they're
7 going for is a cocoa artificial flavoring. The entire point of Rusoff is to be
8 able to replace a low or a poor quality cocoa bean flavor with an artificial
9 chocolate flavor. So although it is an artificial flavor, it's an artificial
10 chocolate flavor, which is in contrast to our noncocoa flavoring.

11 JUDGE SMITH: Well, have you disclosed that your flavor attributes
12 exclude artificial cocoa flavor?

13 MS. LYNCH: Our definition of flavor attribute specifically excludes
14 cocoa flavoring and Rusoff discloses cocoa flavoring, so, yes.

15 JUDGE SMITH: Do you distinguish between artificial and natural, is
16 my question.

17 MS. LYNCH: No, there is no distinguishing between artificial and
18 natural. However, a cocoa flavoring, whether natural or artificial, is still a
19 cocoa flavoring, which is explicitly excluded by our definition of flavor
20 attributes.

21 JUDGE GARRIS: I guess, I would get back to my earlier comment as
22 to whether your specification disclosure acknowledges that adding flavor
23 attributes that are noncocoa was found in the prior art. Judge Smith, -- are
24 you aware of the section of the specification that I am speaking about?

25 JUDGE SMITH: Well, the first full paragraph on page 2, there's a
26 discussion regarding flavor attributes and a statement that these are well-

1 known in the cocoa trade. And beginning at paragraph three, you actually
2 indicate that several ingredients are known to be added in to give a special
3 house flavor.

4 MS. LYNCH: Yup. Or a different overriding dominant flavor. And
5 then if you read the same paragraph, it goes on to state that these flavor
6 attributes of the chocolate product are determined by variations in the
7 processes and the amount of normal ingredients used in chocolate
8 manufacture, for example, cocoa and milk. And as Appellants' claims
9 specifically state, we are adding a noncocoa dairy flavoring.

10 So while it may be known to add flavoring ingredients, such as
11 peppermint or vanilla, that's not what Appellants are going for here.
12 Appellants are using, as defined by flavor attributes, something that is not a
13 nonchocolate flavor for the mere enhancement of chocolate flavor. So in
14 this case, Appellants are using, for example, amino acids and sugars to
15 combine to create a flavor, like a caramel or something, not specifically
16 adding the caramel flavor or the vanilla flavor to the chocolate mass.

17 JUDGE GARRIS: Maybe we could approach this issue more
18 specifically. I see that Claim 2 recites specific flavor attributes that you
19 have in mind. These are the same flavor attributes that you disclose on page
20 2 of the specification as well-known in the art, as Judge Smith pointed out
21 earlier. And I'm looking at the Examiner's answer now and I see in the
22 rejection the Examiner says, "It is appreciated that the specific flavors of
23 Claims 2 and 15 are not indicated in the prior art, but these flavor notes are
24 well-known descriptors of chocolate." I guess his point is it would have
25 been obvious to add them to the chocolate of Ripper. And so my question is,

1 what's faulty in that reasoning? Why would it not have been obvious to add
2 these attributes of Claim 2 to the chocolate of Ripper?

3 MS. LYNCH: Well, Appellants respectfully submit that that is not
4 the rejection that is before Appellants. For example, that may have been a
5 103 rejection in view of Ripper only. However, in that case, Ripper would
6 still teach away from the present claims in view of the conventional process.

7 JUDGE GARRIS: Well, I will read to you the part of the Examiner's
8 rejection where the Examiner made a finding, basically, that the flavor
9 attributes of Claim 2 are known. And your specification supports that
10 finding. And the Examiner seems to be saying, well, it would have been
11 obvious to add these flavor attributes to Ripper's chocolate. And so I get
12 back to my question, well, why is that type of analysis of Claim 2 incorrect?
13 What is the error in the Examiner's obviousness conclusion regarding Claim
14 2?

15 MS. LYNCH: Well, the difference would be how Appellants are
16 defining flavor attributes. The flavor attribute in this case may be something
17 like a caramel flavor, but that flavor attribute is not specifically caramel. It's
18 arriving at that flavor in a different means. So if you look, for example --
19 the fourth paragraph of the detailed description, for example, a way of
20 arriving at that flavor attribute is by combining a flavor precursor into a
21 liquid fat matrix. And that is not simply adding known ingredients to a
22 chocolate mass.

23 JUDGE GARRIS: What in Claims 1 and 2 excludes adding just a
24 known flavor ingredient such as a fruity attribute or praline or caramel or
25 whatever attribute?

1 MS. LYNCH: Well, that is in dependent Claim 2 and independent
2 Claim 1. Appellants require the flavor attribute defined in the specification,
3 which is not disclosed in Ripper or Rusoff.

4 JUDGE GARRIS: My question is, what in Claims 1 or 2 excludes
5 adding, for example, a fruit ingredient to the chocolate of Ripper in order to
6 get a fruity attribute?

7 MS. LYNCH: Okay. The specification discloses several flavor
8 attributes that are known in the art. And it discusses those being known in
9 the art for enhancing the flavor of chocolate. When you look specifically at
10 the definition for flavor attributes, Appellants say that it is not a
11 nonchocolate flavor, for example, a fruity flavor, for the mere enhancement
12 of the chocolate flavor. And, conventionally, as is discussed in the
13 background of the invention, the fruity flavors, vanilla flavors, are added to
14 the chocolate for the enhancement of the chocolate. We are adding a
15 completely different composition that is our flavor attribute that is not
16 merely a fruit flavor or not merely vanilla flavor.

17 JUDGE GARRIS: Maybe I'm not following. I'm sorry, if I seem
18 slow on this. But you say -- you're defining flavor attributes as excluding,
19 for example, a fruit itself. It's simply the precursors that would generate the
20 fruity flavor.

21 MS. LYNCH: Yes.

22 JUDGE GARRIS: And so clarify to me then when you say in your
23 specification at the portion Judge Smith referred to on page 2, "such flavor
24 attributes are well-known in the cocoa trade where they form part of the
25 vocabulary." Are these flavor attributes, that you acknowledge are well-

1 known, the precursors you say you intend by your claim language? Are
2 these the precursors of flavor?

3 MS. LYNCH: Um-hum.

4 JUDGE GARRIS: Well, then that gets me right back to the original
5 question that I had, and it is, what is the error in the Examiner's rejection of
6 Claim 2 where the Examiner says these flavor attributes or notes are known
7 in the prior art and it would have been obvious to add them to the cocoa of
8 Ripper?

9 MS. LYNCH: I guess the best answer to your question is, how are the
10 words "flavor attribute" interpreted? And the Examiner appears to be
11 interpreting noncocoa dairy flavor attribute extremely broadly to include all
12 of those flavor ingredients that are disclosed in the specification. However,
13 Appellants would argue that flavor attributes are expressly defined as
14 something other than those that are known in the art -- or as something
15 different than those that are already disclosed in the art, a different process,
16 way of getting to those flavors without using those specific flavors. So I see
17 your confusion and, I guess, the best answer is how are the terms flavor
18 attribute interpreted?

19 JUDGE GARRIS: Your time is up now. Is there any very brief
20 summary you would like to give to us?

21 MS. LYNCH: Well, very quickly, I would just like to add that several
22 other claims are rejected under a rejection in view of Ripper, Kleinert or
23 Watterson. And with respect to Kleinert, Applicant -- or Appellants would
24 also submit that it directly teaches away from the conventional processes of
25 the present claim. And with Watterson, Watterson is entirely directed
26 toward enhancing a chocolate flavor, or as the Examiner asserts, boosting a

1 chocolate flavor, which Appellants would also submit directly teaches away
2 from our definition of flavor attribute, which requires that it is a -- not a
3 nonchocolate flavor for the mere enhancement of the product. So, therefore,
4 Appellants would submit, in summary, that the combination of the cited
5 references, that the skilled artisan would have no reason to combine them to
6 arrive at the present claims.

7 JUDGE GARRIS: Judge Smith, do you have any further questions?

8 JUDGE SMITH: Regarding Claim 15, which is a product claim, your
9 arguments don't apply to that, do they?

10 MS. LYNCH: The arguments with the respect to the noncocoa dairy
11 flavoring is what Appellants are submitting is deficient with the cited
12 references with respect to Claim 15.

13 JUDGE SMITH: Okay.

14 MS. LYNCH: If there are no further questions --

15 JUDGE GARRIS: Judge Colaianni, any questions?

16 JUDGE COLAIANNI: No questions.

17 JUDGE GARRIS: No further questions.

18 MS. LYNCH: Okay. Thank you for your time today.

19 JUDGE GARRIS: Thank you very much.

20 Whereupon the proceedings were concluded on at 9:52 a.m. on April
21 7, 2009.